IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-457

EXXON PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY OF EXXON PIPELINE COMPANY TO THE BRIEFS IN OPPOSITION OF RESPONDENTS

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The briefs in opposition to the petitions for certiorari are primarily devoted to the same arguments which were raised, unsuccessfully, in opposition to the petitioners' stay applications. Those arguments have not gained in merit with the passage of time.

The federal parties continue their attempt to abolish all restraints on abuse of the suspension power. Despite

the narrow language used in the carefully drafted *Chessie* opinion (*United States* v. *Chesapeake & Ohio R. Co.*, 426 U.S. 500 (1976)), they continue to claim that *Chessie* overruled *Moss* v. *CAB*, 430 F.2d 783 (D.C. Cir. 1970), "insofar as the decision in *Moss* purports to place general limitations on a regulatory agency's ability to use its suspension power to induce the filing of a modified rate tariff . . . ."[1] This attempt by the government to eliminate all restraints against arbitrary abuse of this potent regulatory tool serves only to emphasize the importance of this case and the need for plenary review.

We have previously answered this attempt to pervert the holding of *Chessie* (Petition, pp. 19-20), and will not again do so here. However, there are three arguments made in the briefs in opposition which we have not previously addressed. These are: (1) the argument that abuse of the suspension power is not subject to judicial review; (2) the argument that the particular interim rates imposed by the Commission were reasonable; and (3) the argument that the validity of the refund condition is not presently ripe for review. We address those arguments in turn.

A. Abuse of the Suspension Power Is Subject to Judicial Review

The Alaskan Respondents base their arguments on the premise that exercise of the suspension power is not subject to judicial review. Like Judge Roney, we believe that this issue need not be reached in this case because of the dual nature of the Commission's action, combining as it does a suspension order and a ratemaking order in one document (Pet., p. 41a).[2] If the Court

[1] Brief in Opposition of the Federal Parties, at 12.

[2] *Cf.*, *United States* v. *SCRAP*, 412 U.S. 669, 693 n. 17 (1973), where the Court considered the applicability of *Moss* to the Commission order before it, but concluded that the particular conditions attached to the Commission's refusal to suspend "did not, in any meaningful sense, transform the carrier-made rate into a Commission-made rate." Implicit in the Court's analysis is an acceptance of the *Moss* theory that rates forced on carriers through use of the suspension power are agency-made rates. Moreover, the Court did not repudiate the District Court's suggestion that if *Moss* did apply, it would be an "alternative ground for avoiding the *Arrow* decision." *Id.*

does reach this issue, however, it should rule that an order suspending a carrier-initiated rate, unlike a refusal to suspend, is subject to judicial review.

No claim could be made that judicial review of such an order is precluded under the general test this Court has evolved for determining reviewability. In *Dunlop* v. *Bachowski*, 423 U.S. 814 (1975), for instance, the Court allowed review of a decision at least as discretionary as a suspension decision, namely, a government decision not to file an enforcement action.

The Alaskan respondents apparently contend, however, that the general principles governing judicial review are rendered inapplicable to the suspension power by this Court's decisions in *United States* v. *SCRAP*, 412 U.S. 669 (1973), and *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658 (1963). This claim must founder on the fact that *SCRAP*, the more recent of the two cases, while clearly holding that a court has no power to enjoin the implementation of railroad rate schedules which the Commission refuses to suspend, specifically left open the question of whether a decision to suspend rates was subject to judicial review and the question whether suspension decisions should be reviewed when a claim was made, as it is here, that the Commission had acted beyond its statutory powers. 412 U.S. at 698 n. 22. It also ignores the fact that in *Chessie*, a suspension case, this Court considered at length the legality of the Commission's action, and remanded the case for further judicial review in the District Court. *United States* v.

Chesapeake & Ohio R. Co., 426 U.S. 500 (1976). Finally, respondents' claim is based on a careless reading of *SCRAP* and *Arrow*. Those cases were based on the concept of primary jurisdiction, *see Atchison, T. & S.F. R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 820 (1973), and held only that a court may not itself suspend rates. That question of relief is far different from the question of whether a court may review an agency's exercise of its suspension power to determine whether the agency has acted within the scope of its statutory powers or has abused its discretion.[3] *Cf. Dunlop* v. *Bachowski, supra*, 423 U.S. 814, in which the Court allowed judicial review while reserving the question of injunctive relief. See also *Wichita Board of Trade, supra*, 412 U.S. at 822-826.

Thus, the respondents' attempt to immunize abuse of the exercise of the suspension power from judicial review must fail. It is unsupported by the cases on which they rely, and inconsistent with this Court's subequent decision in *Chessie*.

B. The Interim Rates Were Unreasonable

The respondents contend, and the Fifth Circuit held, that both the decision to impose interim rates and the

[3] A significantly different question is involved when the agency does *not* suspend filed rates than when it does. Unlike a suspension order, which must include a statement in writing of the reasons for suspensiofi. a refusal to suspend need not be accompanied by a statement of reasons. See 49 U.S.C. § 15(7); *Oscar Mayer & Co.* v. *United States*, 268 F.Supp. 977, 981 (W.D. Wis. 1967). This is clear evidence that a refusal to suspend is not judicially reviewable. *Cf. Morris* v. *Gressette*, 45 U.S.L.W. 4773, 4776 (June 20, 1977). Moreover, because shippers can be fully protected by refund conditions or reparations orders, there is less need for judicial review when an agency decides not to suspend an increase. When an increased rate is suspended, the carrier cannot be made whole for any undercollection of revenues during the suspension period, and, as in the present case, if an initial rate is suspended, the carrier cannot perform the proposed service at all.

level of the interim rates are beyond the scope of judicial review. In an effort to make this extraordinary assertion more palatable, the respondents now contend that the particular result in this case is not unjust. Even if that factual assertion were true, it would be irrelevant to the legal issues in this case, for the issues here concern the validity of a holding which makes no distinction between just and unjust agency action. More importantly, the respondents' factual assertion is false, for the rates imposed here were manifestly unreasonable. This case illustrates the danger created by the Fifth Circuit holding, namely, the danger that arbitrary and unreasonable interim rates will be imposed without a full hearing.

While this is obviously not the time to argue in detail the merits of the Commission's prescribed interim rates, there are two major flaws in the Commission's ratemaking methodology in this case which should be mentioned briefly. First, the Commission failed to take into account the fact that the TAPS "initial" level of throughput actually cannot be reached until 1978. The maximum possible throughput during the suspension period is far lower. As a result, the owners cannot ship enough barrels of oil to earn the revenues allowed by the Commission. To obtain the return on investment which the Commission found proper, the owners would have to charge *more* during the suspension period than the proposed long-term rates which the Commission suspended. To achieve the rate of return authorized by the Commission at the reduced throughput during the start-up period, Exxon, for instance, would have to charge roughly $9.00 per barrel, as opposed to the $6.27 in its original filing or the $5.10 allowed by the Commission.[4]

The second major error in the Commission's rate calculation relates to the treatment of the enormous expense

[4] Supplement to Petition of Exxon Pipeline Company for Reconsideration, ICC I&S Docket No. 9164 (filed July 22, 1977).

of restoring the terrain on which the pipeline was built to its original state at the end of the pipeline's life. The Commission allowed collection of an annual sum which will be grossly insufficient to cover this expense, in part because the Commission failed to allow for the fact that the amount collected will be subject to the federal income tax. As a result, at the end of the pipeline's economic life, Exxon would have only $233 million to meet an estimated $466 million liability.

We will not respond here to the attempt of the Alaskan respondents to raise in this Court several attacks on the proposed rates which were not found persuasive even by the Commission. It is enough here to note that the respondents' ill-conceived, result-oriented efforts to defend an untenable legal theory must fail, for the result reached by the Commission in this case is both unsupportable and unjust.

C. Ripeness of the Dispute Concerning the Refund Condition

The Alaskan respondents contend that there is no present case-or-controversy concerning the validity of the refund condition. That argument verges on the frivolous. The effect of the Commission's order was to require Exxon to take certain action—file an amendment to its proposed tariff including a refund condition. If Exxon had failed to do so, it would not have been allowed to use its share of the pipeline capacity. Whether Exxon was required to comply with this directive was certainly a live issue; the Commission's order was reviewable because it had an immediate impact on Exxon's rights and obligations. *See Pennsylvania Railroad* v. *United States*, 363 U.S. 202, 205 (1960); *City of Chicago* v. *United States*, 396 U.S. 162 (1969). By submitting to the Commission's requirement, Exxon was forced to relinquish a possible defense

to reparations[5] and to relieve the shippers of the burden of proof which they would otherwise have in a reparation proceeding. *See* 49 C.F.R. § 1100.100. If Exxon had simply complied with the requirement without protest, it is not at all clear that it could have challenged the validity of the refund condition at some later time. As in the leading case of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152 (1967), immediate review is appropriate because the agency action has a direct, immediate effect, and places the aggrieved party in a dilemma in which it must comply or suffer unfavorable consequences.

D. Conclusion

In our petition for certiorari, we have pointed out the importance of the issue presented by this case. The Fifth Circuit allowed the Commission to engage in ratemaking without a hearing under the pretext of exercising its suspension power, in total disregard of this Court's holding in *ICC* v. *Cincinnati, N.O. & T.P. Ry.*, 167 U.S. 479 (1897), that the ratemaking power is never to be extended by implication. The Fifth Circuit also based its far-reaching decision upon a perverse misreading of this Court's opinion in the *Chessie* case. As a result of the Fifth Circuit's decision and the conflicting decision of the

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[5] Reparations are not automatically available as of right when a rate is found prospectively unreasonable. In *Arlington Heights Fruit Exch.* v. *Southern Pacific Co.*, 39 I.C.C. 88, 93 (1916), for instance, the Commission denied reparations because it "was considering a novel service only recently introduced, whose efficiency and permanence were in some degree problematical." The Commission commented that:

> "Under such circumstances the question of fixing a reasonable rate is attended with no little uncertainty, and the immediate establishment of an appropriate and reasonable charge for the new service is possibly requiring more of the carriers than in fairness could be exacted." *Ibid.*

We believe that such a defense may be available if a shipper sought reparations from Exxon.

D. C. Circuit in *Moss*, the present state of the law is confused concerning the existence of restraints on abuse of the suspension power. Moreover, the court's decision below invites further disregard by administrative agencies of the statutory and Constitutional limitations on their power. Only this Court can resolve the present uncertainty on these important issues of administrative law created by the Fifth Circuit's decision.

Petitioner respectfully requests that its petition for certiorari in this important case be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard J. Flynn, counsel for petitioner Exxon Pipeline Company and a member of the bar of this Court, hereby certify that, pursuant to Rule 33, copies of Exxon Pipeline Company's Reply to the Briefs in Opposition of the Respondents have been served upon all parties to the proceeding below and upon the additional parties listed below via first class mail, postage prepaid by depositing the same in the United States Postal Service at Washington, D. C., this 10th day of November, 1977:

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see

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